

# **BOARD OF DESIGN REVIEW MINUTES**

**January 17, 2002**

**CALL TO ORDER:** Vice-Chairman Stewart Straus called the meeting to order at 6:30 p.m. in the Beaverton City Hall Council Chambers at 4755 SW Griffith Drive

**ROLL CALL:** Present were Vice-Chairman Stewart Straus; Board Members Cecilia Antonio, Hal Beighley, Mimi Doukas, Monty Edberg, Ronald Nardoza and Jennifer Shipley.

Development Services Manager Steven Sparks, Senior Planner John Osterberg, Associate Planner Tyler Ryerson, Associate Planner Scott Whyte, Associate Planner Sambo Kirkman, Associate Planner Liz Shotwell, Assistant Planner Laura Kelly, Assistant Planner Leigh Crabtree, Assistant Planner Jeff Caines, Assistant City Attorney Ted Naemura and Recording Secretary Sandra Pearson represented staff.

## **VISITORS:**

Vice-Chairman Stewart Straus read the format for the meeting and asked if any member of the audience wished to address the Board on any non-agenda item. There was no response.

## **STAFF COMMUNICATIONS:**

Development Services Manager Steven Sparks observed that the Public Hearing to consider the application BDR 2001-0155 – Home Depot at Beaverton/Hillsdale Highway Type 3 Design Review is scheduled for Thursday, January 24, 2002.

Mr. Sparks mentioned that the new Comprehensive Plan, effective February 8, 2002, has been distributed, adding that it replaces the current document.

At the request of Mr. Sparks, members of staff in attendance introduced themselves, as follows:

- ?? Associate Planner Tyler Ryerson;
- ?? Assistant City Attorney Ted Naemura;
- ?? Assistant Planner Jeff Caines;
- ?? Associate Planner Liz Shotwell;

?? Assistant Planner Laura Kelly;  
?? Assistant Planner Leigh Crabtree;  
?? Recording Secretary Sandra Pearson;  
?? Associate Planner Scott Whyte;  
?? Senior Planner John Osterberg;  
?? Development Services Manager Steven Sparks; and  
?? Associate Planner Sambo Kirkman.

## **NEW BUSINESS:**

### **WORK SESSION:**

#### **1. Operational Changes in the Community Development Department.**

Mr. Sparks discussed revisions and improvements that had been made to the offices of the Community Development Department since the fire in June 2001. He described the self-service area available to the public, emphasizing that staff is available and happy to provide any necessary assistance. Observing that extra cubicles have been included, he noted that this would provide room for additional staff, as necessary.

Mr. Sparks described efforts at updating the City's web page for the Community Development Department, observing that Public Notices are sorted by the different NAC's.

#### **2. Summary of Changes in State Statute.**

Noting that most of the changes in State statute would not affect the Board of Design Review, Mr. Sparks mentioned that there would be changes affecting applications concerning churches. On question, he advised Mr. Straus that churches would be permitted customary uses associated with services, child care and meal programs, adding that parking and compatibility would be issues for consideration.

Senior Planner John Osterberg emphasized that the Board of Design Review focuses on design issues as related to use, rather than the use itself.

Mr. Beighley questioned whether bingo would be considered a permitted use.

Mr. Sparks noted that the Prince of Peace Lutheran Church had submitted 2 pages of potential church activities and uses, consisting of approximately 100 uses, adding that with each use, it is necessary to calculate the parking requirement.

3. **Ex-Parte Contact/Conflict of Interest.**
4. **Conduct of Hearings.**

Assistant City Attorney Ted Naemura noted that he intends to address both of these issues simultaneously, adding that both involve the responsibilities of the Board of Design Review and how the vast majority of hearings are limited land use action decisions made at a lower level of procedure. He pointed out that he anticipates that more expedited proceedings and participation would be intended in the future.

Mr. Naemura discussed ex-parte contact, conflict of interest and bias, emphasizing that all evidence must be disclosed and each applicant is entitled to view this evidence. He described ex-parte contact as pre-hearing contact “outside of the other party’s presence”, observing that this does not necessarily break down the process. He discussed the procedure for dealing with ex-parte contact, and referred to a disclosure exercise on page 10.

Requesting clarification of whether a board member should visit a site prior to a hearing, Mr. Straus questioned whether this would be considered ex-parte contact.

Mr. Naemura confirmed that a site visit is technically considered a pre-hearing contact with the subject property, rather than an individual. Observing that the board member might have a different view of the site from that of the applicant, he emphasized that the board member should not have contact with any individual(s) at the site.

Vice-Chairman Straus expressed his opinion that rather than requesting disclosure on any ex-parte contact for all items at the beginning of the meeting, a separate request for this disclosure should occur at the introduction of each item.

Mr. Sparks agreed with Mr. Straus, assuring him that staff intends to revise this procedure.

Expressing his opinion that members of the Board of Design Review would recognize ex-parte contact, Mr. Naemura pointed out that staff is not considered ex-parte contact and is able to talk them through this issue.

Mr. Edberg questioned whether Mr. Naemura is attempting to discourage site visits by members of the Board of Design Review.

Assuring Mr. Edberg that he has no intention of discouraging site visits, Mr. Naemura pointed out that he generally participates in site visits himself with LUBA appeals.

Mr. Naemura discussed conflict of interest, bias and prejudice, and referred to the current application for a *Home Depot* on Beaverton/Hillsdale Highway.

Ms. Doukas pointed out that as a member of the applicant team for the *Home Depot* application, she is the obvious example.

Observing that Home Depot is sponsored by Ms. Doukas' employer, *WRG Design*, Mr. Naemura stated that Ms. Doukas is obliged to recuse herself from participating in this decision. On question, he informed Mr. Sparks that in this event, Ms. Doukas could choose to either leave the dais and sit in the audience or actually leave the room.

Mr. Osterberg observed that a board member recusing himself or herself from participating in a decision should leave the dais.

Mr. Sparks pointed out that in the case of Ms. Doukas regarding *Home Depot*, Ms. Doukas could be required to testify at some point.

Mr. Naemura discussed a potential conflict of interest, observing that while this is less obvious and has less direct effect, because a conflict might exist, the individual board member must make the decision of whether or not to participate.

Mr. Sparks questioned whether it is necessary to disclose a mutual fund or a single share of stock.

Mr. Naemura advised Mr. Sparks that there is a very remote chance that a mutual fund or share would be great enough to create a conflict of interest, although personally holding 1,000 shares of *Home Depot* might create a conflict warranting disclosure, making it necessary for an individual to consider whether or not to participate in this particular decision.

Ms. Doukas requested clarification of how to address a situation in which members of the public question whether a conflict of interest exists.

Observing that any member of the public has the right to question whether a conflict of interest exists, Mr. Naemura emphasized that it is advisable to invite discussion, if any, at the beginning of the Public Hearing. On question, he informed Mr. Straus that it is also possible for a member of the public to challenge the right of a board member to participate in a decision.

Mr. Osterberg requested clarification of how to resolve such a challenge by a member of the public.

Ms. Doukas expressed her opinion that if such discomfort exists, the board member should willingly step down during that particular decision.

Mr. Naemura emphasized that whether or not to recuse oneself from participating in a particular decision is an individual decision, adding that it is often possible to diffuse some apparent bias.

Mr. Sparks pointed out that advocacy does not constitute bias.

Referring to the Order of Presentation or Sequence of Events located on page 2 of the agenda, Mr. Naemura noted that this must be embodied within the findings described on pages 6 and 7.

Describing this as a huge legalistic quagmire, Mr. Straus requested whether or not the Staff Report basically summarizes all information, with the exception of the new information introduced at the Public Hearing.

Mr. Naemura agreed that the Staff Report includes all information but for the new information presented at the Public Hearing.

Vice-Chairman Straus pointed out that the minutes also become a part of the Land Use Order, observing that they provide the rationale of how the Board of Design Review had arrived at their decision. He mentioned that the Public Hearing is closed, followed by a motion and amendments, and finally the adoption or approval of the motion.

Ms. Doukas mentioned that although the board members are able to disagree with staff's findings, these findings must be replaced with new findings.

Vice-Chairman Straus noted that the recorder keeps a record and staff creates new findings from this record.

Mr. Sparks emphasized that the Land Use Order is the official record.

Vice-Chairman Straus expressed concern that the Land Use Order might not address all necessary issues.

Mr. Ryerson suggested that it is necessary to let staff know which criteria a finding is based upon.

Mr. Osterberg mentioned that the rationale should be explained, through specific issues, adding that an overall conclusion must be reached, as well as an explanation of how this conclusion was reached.

Vice-Chairman Straus requested whether recourse for reconsideration of a decision is available.

Observing that recourse for reconsideration of a decision is addressed in a new Development Code section to modify a decision, Mr. Naemura emphasized that substantial evidence must be identified, the record must be developed properly, and that criteria must be appropriately addressed.

Ms. Doukas referred to the deliberation process, noting that this could involve either a motion or leaving the hearing open for further deliberation.

Vice-Chairman Straus pointed out that a complicated issue should be kept open, adding that the applicant and any member of the public who testified previously should have further opportunity to testify.

Expressing his opinion that this is valid and that it is necessary to make the best decision possible, Mr. Naemura mentioned that the apartments next to the nature park provided an excellent example of what he referred to as “dueling experts”. He pointed out that this issue provided a perfect situation, including kids with buttons, noting that at some point, it is necessary to believe someone and make an appropriate decision.

Ms. Doukas emphasized that the burden of proof ultimately rests upon the applicant.

Mr. Naemura noted that in addition to the burden of proof, the applicant has more rebuttal rights.

Mr. Sparks commented that the staff and board members must all hear the same message.

Referring to page 2, which specifically address voting, Mr. Naemura advised members of the Board of Design Review that his office is specifically requesting that there be no tied votes on future decisions.

Ms. Doukas mentioned that it had been her experience that the Chairman should not vote, unless it is to actually break a tied vote.

Mr. Naemura advised Ms. Doukas that all members of the Board of Design Review are required to vote, adding that a continuance is preferable to a tied vote. On question, he informed Mr. Edberg that the City Council had resolved the previous controversial tied votes, and further that:

?? The issue involving the cellular tower had gone to both circuit court and LUBA, involving a writ of mandamus, and remains controversial; and

?? The issue involving the church had only involved an appeal by the neighbors to LUBA, who had affirmed the City Council's approval of the decision of the Board of Design Review.

Mr. Sparks pointed out that the by-laws mandate that a member of the Planning Commission is supposed to serve on the Board of Design Review.

Mr. Osterberg pointed out that although former Chairman Lemon had expressed his opinion that a tied vote basically constitutes a denial of an application, the City Attorney had not agreed and had determined that a decision had not been made.

Ms. Doukas pointed out that it is sometimes necessary to make two motions, both for approval and denial of an application, in an attempt to get a motion passed.

Vice-Chairman Straus informed Ms. Doukas that motions for both approval and denial of the application had been made in both instances, adding that all resulted in tied votes and that the applicant had refused to request a continuance, which might have resolved the issue at a later time.

Mr. Nardozza emphasized that it is not possible to force an applicant to request a continuance.

Mr. Naemura agreed, noting that while it is possible to attempt to convince an applicant of the wisdom of continuing an application, they cannot be forced to waive the 120-day rule.

Mr. Nardozza questioned at which point in the 120-day period an application generally reaches the Public Hearing stage.

Vice-Chairman Straus stated that the Public Hearing is generally held earlier than the 90<sup>th</sup> day in the 120-day period.

Mr. Naemura emphasized that the 120-day period includes the final decision and all appeals.

Mr. Ryerson commented that notification requirements make it more difficult to meet the 120-day deadline.

Vice-Chairman Straus observed that most appeals involve Type 3 applications.

Mr. Sparks pointed out that it requires a great deal of effort on the part of staff to meet the 120-day deadline when an appeal is involved.

Mr. Nardozza described a hypothetical application in which staff recommends denial, noting that although the application had not appeared to be complete initially, new evidence had been presented, and questioned whether staff would have any leverage in such a situation.

Mr. Naemura commented that staff could indicate that the application lacks evidence.

Vice-Chairman Straus expressed his opinion that the Board of Design Review would have the option of denying the application or continuing the Public Hearing.

Mr. Ryerson referred to situations in which the public has pages of materials to submit and only a 2-minute time limit with which to present the material.

Mr. Naemura suggested the possibility of the Chairman calling for a brief recess in order to allow the board members adequate time to review the information.

Mr. Sparks pointed out that appeals to the City Council are on the record, noting that regulations regarding last minute evidence allows for an appeal to the City Council even though the decision making body (Board of Design Review) has not had adequate time to review all evidence. He mentioned that although written materials are due by a certain time, the law provides that this information can be submitted up until the last minute.

Mr. Osterberg stated that it is necessary to determine whether this last-minute information is relevant, observing that it is still part of the record and could still be appealed.

Mr. Sparks emphasized that the burden of proof is upon the applicant or appellant to successfully demonstrate to the City Council that the Board of Design Review's decision was in error, pointing out that this is often made more difficult by what he referred to as "dueling engineers".

Mr. Naemura discussed this "last minute battle of the experts", noting that a new Development Code section provides for the right to submit new material after the Public Hearing has been closed and that the decision-



making body must then respond by holding the record open or continuing the Public Hearing.

Mr. Edberg expressed his opinion that a motion voted down constitutes a denial.

Ms. Doukas clarified that a motion for denial must still be made, noting that the decision-making body must approve an application that is within their power to approve with Conditions of Approval.

Mr. Naemura agreed that if possible, the decision-making body must determine appropriate Conditions of Approval and approve the application with these conditions, adding that no Code law compels this outcome as a matter of right.

Vice-Chairman Straus stated that a motion is necessary to continue a Public Hearing or keep the record open.

Mr. Naemura clarified that keeping the record open involves a period of at least 7 days.

Vice-Chairman Straus suggested that a Condition of Approval requiring the re-submittal of a revised plan also serves the purpose of keeping the record open.

Mr. Naemura mentioned the possibility of an applicant submitting a request to submit additional material, evidence and arguments.

Referring to page 9, Ms. Doukas pointed out that if the record is left open, it is necessary to reopen the record.

Vice-Chairman Straus emphasized that this does not necessitate reopening the Public Hearing.

Mr. Sparks briefly discussed the conduct of hearings and scope of review, emphasizing that the Planning Commission reviews use, rather than design issues, and that the Board of Design Review reviews design issues, rather than use, observing that the public appears to be ignorant of this significant difference.

## **5. Overview of Upcoming Development Services Division Projects.**

Mr. Sparks provided a brief overview of upcoming projects before the Board of Design Review, including *Home Depot* and several projects submitted by the Beaverton School District. He also mentioned that he

anticipates potential revisions to the Board of Design Review's by-laws, as well as amendments to the sign code.

Vice-Chairman Straus mentioned that he would like to be involved as a liaison in the amendments to the sign code.

Mr. Sparks pointed out that a telecommunications ordinance is being considered, noting that this issue would be reviewed by the Planning Commission and possibly the Board of Design Review.

Mr. Sparks discussed the Development Code Update project, noting that the biggest changes would be in Chapter 40 – Applications and Chapter 50 – Procedures.

Mr. Sparks discussed the possibility of parallel processing of appeals by 2 separate bodies (Planning Commission and Board of Design Review), observing that State law provides for a consolidated review procedure. The proposed Development Code identifies consolidated applications to be reviewed by the Planning Commission.

Mr. Sparks mentioned that the possibility of a Hearings Officer, rather than the Board of Design Review or Planning Commission, making certain decisions, adding that although staff is considering weekly meetings of the Board of Design Review, this would only occur when necessary.

Vice-Chairman Straus emphasized that the 2<sup>nd</sup> and 4<sup>th</sup> Thursdays of each month should be the primary meetings of the Board of Design Review.

Mr. Sparks stated that there would be a “trigger date”, based upon when an application is deemed complete.

Observing that weekly meetings would create problems for some members of the Board of Design Review, Vice-Chairman Straus commented that this issue should have been discussed with them prior to making such a decision. Noting that the board members had been requesting a meeting with Mayor Drake and staff for some time, he pointed out that he anticipates being available for only half of the time if meetings are scheduled on a weekly basis.

Mr. Edberg expressed concern with a potential quorum issue.

Vice-Chairman Straus suggested the possibility of continuing the meetings twice a month, with the option of more, if necessary, adding that this should not occur very frequently and he should be able to accommodate this schedule.

**6. Board of Design Review Concerns and Issues.**

Mr. Sparks questioned whether members of the board have any other issues or concerns they would like to discuss.

Vice-Chairman Straus observed that he has concerns with Code Enforcement follow up to Conditions of Approval.

Mr. Sparks advised Mr. Straus that although staff is attempting to establish a procedure to address Code Enforcement, there is not adequate staff to enforce this issue.

Ms. Doukas suggested that the election of officers occur at the beginning of the next meeting.

Mr. Naemura pointed out that he expects that Community Development Director Joe Grillo and City Attorney Mark Pilliod would be attending the future Public Hearing with regard to the application of Beaverton School District for a Bus Barn.

**MISCELLANEOUS BUSINESS:**

The meeting adjourned at 8:56 p.m.